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No. 10-1087

IN THE

Supreme Court of the United States

STEVEN J. THOROGOOD and MARTIN MURRAY,

Petitioners,

v.

SEARS, ROEBUCK & CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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Sears' Opposition ignores Supreme Court Rule 15.2[1] by misstating the facts, law, and circuit splits presented by the Petition, and presents no legitimate basis for denying *certiorari* in this case. Where Sears was supposed to explain to this Court why (if at all) the issues raised by the Petition did not justify *certiorari*, instead, it glossed over the issues, ignoring the Petition's due process and collateral estoppel procedural arguments *entirely*. Indeed, Sears' Opposition does not *mention the term* "due process" even *once*.

Finding no flaw with Petitioners' presentation of the bona fide splits posed by the Seventh Circuit's holding below (that absent members of a de-certified class may be bound and enjoined based on mere "adequate representation" without notice), Sears' Opposition transparently seeks to diminish the Court's appetite for review of issues that are substantial and timely by virtue of mere ad hominem attacks. Even Sears' distortions, however, fail to derail the compelling case for granting *certiorari*. The conflicts presented by *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842 (7th Cir. 2010) ("*Thorogood III*") are ripe for review, and *certiorari* should be granted.

I. Sears' Opposition Fundamentally Misstates the Facts.

Failing to identify any misstatements of fact in the Petition, Sears' "Statement of the Case" is merely

1. *See* Sup. Ct. R. 15.2 ("In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted.")

Sears' spin on the facts, packed with rhetoric that is inflammatory and irrelevant to the issues before the Court. Despite Sears' numerous factual misstatements, Petitioners address only the most blatant few, so as to bring the discourse back to what the case is actually about, and to address the loan new point Sears actually raised.[2]

Foremast, Sears' mischaracterizing Thorogood's claim as founded upon his discovery that his dryer "drum front contained 'at least 11.5 percent chromium'", Sears' Opposition ("Opp.") at 14, has it totally backwards. This factual misrepresentation shows a fundamental ignorance of the facts of the case, and Thorogood's actual claim. Thorogood (a metallurgical engineer)'s claim was that he paid a premium for a dryer misrepresented as *having* a stainless steel drum, when a significant portion, the front face, was actually merely coated mild steel (which, in time, chips and rusts), discovered only by the presence of rust-stained clothes. Contrary to Sears' misstatement, it was the fact that a major portion of the dryer drum *lacked* chromium that triggered Thorogood's claim. Stainless steel gets its unique, non-rusting quality precisely *because* it is an alloy containing a percentage of chromium.

Sears' determination to mislead the Court is further evidenced in its selective account of *Thorogood*'s procedural history. For example, Sears omits mention that the Seventh Circuit's Rule 23(f) grant of interlocutory appeal, was initially denied by one panel, Opp. at 6, only to be granted by a different panel after a decision by the Tennessee Supreme Court created the procedural issue

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2. *See* Sup. Ct. R. 15.6. ("Any petitioner may file a reply brief addressed to new points raised in the brief in opposition").

this Court later resolved in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431 (2010). Furthermore, Sears mischaracterizes itself as having "offered a settlement" Opp. at 6.; rather than a forced mootness Rule 68 Offer of Judgment, and then presents the resulting dismissal as if the district court had done so on the merits. *See Thorogood v. Sears, Roebuck & Co.*, No. 06C1999 (N.D.Ill. July 1, 2009), *aff'd, Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750 (7th Cir. 2010). Sears' factual inaccuracies should not divert the Court from the important issues and conflicts at hand.

II. Sears Opposition Ignores the Central Thrust of the Petition and Attempts to Divert The Court's Attention From the Conflicts and Actual Circuit Splits Created By *Thorogood III*.

A. *Thorogood III* Is Ripe For Review.

Continuing in its diversionary efforts, Sears asserts that this Court's review is premature until the injunction actually issues. Opp. at 12. That contention ignores the fundamental question presented—whether there is any jurisdiction whatsoever over absent class members to support enjoining them. Indeed, if the Illinois District Court lacked jurisdiction to enjoin absent class members, the matter before that court simply ends, precluding any jurisdiction to enjoin absent parties at all.

Moreover, the terms of the Seventh Circuit's mandate are clear as to who is to be enjoined—The Seventh Circuit explicitly directed the district court to enjoin "members of Thorogood's class as well as the lawyers", Pet. App. 22a; as well as "what qualifications ***must*** be reflected in

the injunction", *id.* (emphasis added): the injunction must "cover all class action suits challenging representations in Sears' existing advertising, labeling, and other marketing that the stainless steel drums in Kenmore dryers are made of stainless steel." *Id.* at 23a. The Illinois District Court has now granted Sears' "permanent" injunction, which Sears has since submitted for signature.[3] *See Thorogood* Dkt. 199. Nonetheless, the appellate mandate is reviewable, as here, when all that remains is for the lower to court to enforce it. *See Tyler v. Magwire*, 84 U.S. 253, 282-283 (1872) (holding that lower courts have no authority to deviate after receiving the mandate of an appellate tribunal); *see also Dep't of Banking, State of Nebraska v. Pink*, 317 US 264, 267 (1942) (judgment held to be final and reviewable where appellate decision ended the litigation by fully determining the rights of the parties) (citing *Mower v. Fletcher*, 114 U.S 127, 128 (1885)).

Even if *Thorogood III* is considered interlocutory, this Court has full authority and jurisdiction to review interlocutory judgments of federal courts of appeals pursuant to 28 U.S.C. §1254(1). *See* R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice § 4.18, p. 224 (6th ed.1993). Indeed, this is precisely the sort of situation the Court has held would require such immediate review. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (citing cases of "public interest and general importance" and cases where conflict exists between "federal courts of different circuits" as reasons for immediate grant of *certiorari*). Moreover,

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3. A fundamental question of course remains how it is fair to require all members of a decertified class to come to the Illinois District Court for modification of the terms of the injunction.

the Court has specifically made clear that remanding a decision of a district court does not bar *certiorari*. *See Mazurek v. Armstrong*, 520 U.S. 968, 971 (1997) (granting *certiorari* after the Ninth Circuit vacated the district court's judgment and remanded "with instructions to reconsider the 'balance of hardships'" and determine the appropriateness of the injunction, but *before* the district court had reconsidered the preliminary injunction motion) (citing *Estelle v. Gamble*, 429 U.S. 97, 98 (1976); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)).

Finally, Sears' reliance on the Seventh Circuit's recognition that its order may need to be modified in light of *Smith v. Bayer, cert. granted*, 131 S.Ct. 61 (2010), Opp. at 12, does not render *Thorogood III* non-reviewable by this Court any more than any other injunction that may need to be modified in light of a change in circumstance or future decisions by this Court. Indeed, it is the fundamental authority of the Seventh Circuit to enjoin absent members of a non-class that is squarely presented to this Court for resolution.

B. Sears' Argument That *Thorogood III* Is Unordinary Is Irrelevant.

Sears' efforts to convince the Court that *Thorogood III* is unusual or "unique", Opp. at 15-18, merely harps the Seventh Circuit's unfortunate language, and further distort the facts.[4] Sears cites no authority in support

4. The hypocrisy in Sears' argument that Petitioners once asserted "that the relevant consumer protection laws in all 29 jurisdictions...were substantially similar", Opp. at 16, contradicts Sears' continuous argument that the "differences among the [29] consumer protection statutes are numerous and significant" and

of its assertion that only "ordinary class actions" are appropriate for review. *See* Opp. at 15-18. Stripping away the screed, what counsel did here was, after having its mulit-jurisdcition class decertified, filed a California case for a single-state California class. The court's hostility aside, this is simply not an abuse. *See In re Bridgestone/ Firestone Inc.*, 333 F.3d 763 (7th Cir. 2003). No element of this erroneous, unsupported argument diminishes the wisdom of granting *certiorari* or the need to address the important issues presently before the Court.

C. *Thorogood III*'s Conflict with this Court's Precedents and Other Circuits' Holdings Warrants Review.

1. What Sears totally ignores is the issue actually presented—what due process is due to absent class members before binding them, as well as *Thorogood III*'s direct conflict with this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (holding absent (b)(3) class members cannot be bound without notice and an opportunity to participate or opt out). *See also* Pet. at fn. 16 (citing the other United States Circuit Court of Appeals unwavering adherence to the *Shutts*' rule).

Moreover, Sears' contention that *Thorogood III* satisfies the requirements of *Taylor v. Sturgell*, 553 U.S.

"vary on a range of fundamental issues." *See Thorogood* Dkt. 52 at 11-12. Regardless, the Seventh Circuit never even "actually decided" whether the various state statues were similar in any way. *See Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742 (7th Cir. 2008).

880 (2008), fails to bridge the chasm. *See* Opp. at 23 & 25. Indeed, the conflict precisely presented to the Court is whether *Thorogood III*'s mere "adequate representation", without first satisfying Rule 23's procedural safeguards of notice and opportunity to opt out, suffices as the type of "properly class action" that *Taylor* envisioned. *Taylor*, 553 U.S. at 894-95.[5]

Sears' effort, Opp. at 14, to distinguish *Smith*'s potential class members on the basis that they were "never certified" from *Thorogood*'s class, which (though previously certified), was decertified on a Rule 23(f) review before any notice could be given to class members, and where the injunction was issued three years later, all without notice, is a distinction without substance. Certification standing alone, without its attendant protections (notice and opportunity to opt-out or participate) binds absent class members no more than a never-certified class. *Certiorari* is necessary, even just to decisively resolve the question of whether due process is violated when a court attempts to bind absent (b)(3) class members, whether the class was never notified *or* the class never certified. Pet. at 19.

2. Sears mischaracterizes Petitioners' argument that the All Writs Act 28 U.S.C. § 1651(a) ("the Act") cannot be used as a separate jurisdictional basis to preclude absent class members. Petitioners do not dispute that the Act permits federal courts to issue injunctions "necessary or appropriate" to "prevent the frustration of orders... previously issued". Opp. at 19. Instead, what the Petition

5. *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974) ("Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided.").

raises, *inter alia*, is that the Act remains subject to due process constraints, and is not a vehicle to *circumvent due process* or the application and review of the doctrine of collateral estoppel in a second action. To that effect, the Seventh Circuit's reliance on the Act to enjoin absent class members *without* establishing appropriate jurisdiction over the class, or where no judgment of the issuing court is threatened, directly contradicts this Court's precedent and the decisions of other federal courts. *See* Pet. § II at 21-24.[6]

Thus, all Sears' arguments here are pure diversion. Sears' assertion of *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977) to support enjoining non-parties "in a position to frustrate the implementation of a court order or the proper administration of justice", Opp. at 20, and every other case cited by Sears in the same vein are inapposite, because, in each one, the enjoined party was already either (1) within the court's jurisdiction (whether by virtue of membership in a certified class, or in connection with a settlement); (2) involved in pretrial discovery in the context of a multi-district litigation; or (3) in a non-class case involving an individual who was already before the court (by notice or otherwise). For example, *Matter of VMS Sec. Litig.*, 103 F.3d 1317 (7th Cir.1996)[7] involved enforcing an approved settlement against a previously notified and certified class. *See also id.* at 1324 (explicitly holding that, after notice, class members "failure to opt out manifest[ed] their consent

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6. At best, Sears' argument would be whether the pre-notice reversal of certification constitutes a judgment entitled to protection against the absent "class members".

7. Mislabeled in the Opposition as "VSM". Opp. at vi & 20.

to have the district court resolve matters involving the class action settlements"); *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1203 (7th Cir. 1996) (injunction protected discovery ruling in an MDL proceeding); *In re March*, 988 F.2d 498, 500 (4th Cir. 1993) (non-class action in which individual enjoined had previously subjected himself to the court's jurisdiction); *Keishian v. Buckley*, 752 F.2d 1513, 1515 (11th Cir. 1984) (non-class action where court previously had proper jurisdiction over those enjoined); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983) (same); *Teas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263, 1268 (5th Cir. 1983) (non-class action where court limited injunction in order to pay "appropriate deference to considerations of due process").

3. Finally, Sears asserts that it would be unreasonable to require Sears to seek mandamus from the Ninth Circuit before returning to the Seventh Circuit to obtain injunctive relief against a case proceeding in a California district court. Opp. at 26.[8] Petitioners raised mandamus, as well as the other "adequate remedies" available, *see* Pet. at 32-4, to demonstrate the numerous adequate remedies

8. Sears disdain for the idea of seeking protection in the Ninth Circuit—which actually does have supervisory authority over the California federal district court—in favor of pursuing an equally extraordinary All Writs injunction from the Seventh Circuit is unavailing. Indeed, this extra-Circuit request for enforcement (rather than seeking direct relief from the appropriate court of review) strains the Act's original intent and is a blatant attempt to benefit from the Seventh Circuit's view that "adequate representation" alone is enough to preclude absent class members, rather than adhering to this Court's more stringent requirements of "minimal due process". *Shutts*, 472 U.S. at 811-12.

available to Sears, and that, *Thorogood III*'s injunction, despite the existence of these adequate remedies, conflicts with the decisions of this Court[9] and other federal circuits[10] refusing injunctions under these circumstances.

Sears' argument here also ignores the statutory federal court system structure, which legally precludes Sears' resort to cross-circuit management. *See* 28 U.S.C. §§ 41 (California is embraced within the Ninth Circuit) and 1294(1) ("appeals from reviewable decisions of the district court...shall be taken to the court of appeals... for the circuit embracing the district"). Furthermore, Sears' attempt to reject its obvious intra-circuit remedies, in favor of shopping for relief in a distant and favorable circuit, would encourage end runs around the federal judicial structure and ignores even the Seventh Circuit's history of direct mandamus review. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). The need to refuse this type of cross-circuit review is yet another reason this Court should issue a writ of *certiorari*.

III. Conclusion

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9. *See e.g., Cheney v. United States Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380-81 (2004); *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999).

10. *See Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1132 (11th Cir. 2005) (refusing to issue an injunction and holding that the ability of a party to raise its claims in a "concurrent federal proceeding" to be an adequate remedy at law); *Porto Rico Tel. Co. v. Puerto Rico Commc'n Auth.*, 189 F.2d 39, 42 (1st Cir. 1951) (same); *Grider v. Keystone Health Plan Cent., Inc*, 500 F.3d 322, 332 (3rd Cir. 2007)(same).

Sears' objections to the Petition are either misstatements or diversions. None diminish the need and appropriateness of *certiorari* in this matter in order to address the important issues and conflicts *Thorogood III* presents.

The Court should therefore grant *certiorari* and declare that due process entitles *all* absent (b)(3) class members to notice and an opportunity to opt-out or participate before being bound *in personam*, or otherwise enjoined, and that the All Writs Act is subject to due process restrictions.

IV. Prayer for Relief

Petitioners respectfully pray that the Court grant the Petition for writ of *certiorari* and reverse the opinion and judgment of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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